Puspanathan a/l Ramiayah v Zakaria bin Osman

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–295 OF 2002
KAMALANATHAN RATNAM J
20 AUGUST 2003

***Tort** — Negligence — Road accident — Motor accident — Apportionment of liability — Collision from opposite direction — Two version of defendant's evidence — Whether sessions court judge's finding of 50:50 liability should be set aside — Whether defendant should be totally liable based on evidence*

The plaintiff was riding his motorcycle when he collided into a motorcar driven by the defendant from the opposite direction. The plaintiff's claim for negligence was that the defendant failed to stop at the junction before emerging into the main road. As a result of the collision, the plaintiff sustained serious injuries. The defendant made a police report and said that the plaintiff was proceeding from his opposite direction and then entered into his path. However, in his evidence in court, he suddenly came up with a second version, that the plaintiff had emerged from his left and across his path. The learned sessions court judge believed the defendant's version rather than the plaintiff's version but found the defendant equally negligent for the accident and apportioned liability at 50:50. The plaintiff appealed to the High Court.

Held, allowing the plaintiff's appeal and finding the defendant totally liable:

(1) The defendant had not explained the difference between what was stated in his police report and what was stated in his evidence in court. Surely if this was what happened, he would not have omitted to mention this version in his police report which was made shortly after the accident. His significant failure to explain why he said what he said in his police report must weigh heavily when analyzing his evidence. (see pp 548I, 549A–B).

(2) The learned sessions court judge had failed to consider the damages to the two vehicles. The damages to the defendant's motorcar were mostly on the right hand side. Of significance was the fact that the front right wheel was bent and the front right body and door, dented. These damages, together with the front rim of the motorcycle being broken clearly showed an impact consistent with the plaintiff's version of the defendant emerging from the plaintiff's left and turning right across the plaintiff's path when the collision occurred (see p 549C–D).

(3) Having considered all these aspects, it was clear that the learned sessions court judge's finding of equal liability of both parties could not be supported by the available evidence. The evidence of the investigating officer who testified that from his investigations he had ascertained that each party was proceeding from the opposite direction to one another also must be rejected. There was no basis for such a conclusion. He led no evidence as to the type of investigations he had done to enable him to arrive at such a conclusion (see p 549F–G).

[Bahasa Malaysia summary

Plaintif sedang menaiki motorsikal beliau apabila beliau berlanggar dengan sebuah kereta yang dipandu oleh defendan dari arah yang bertentangan. Tuntutan plaintif untuk kecuaian adalah di mana defendan telah gagal untuk berhenti di simpang sebelum masuk ke jalan utama. Akibat daripada perlanggaran tersebut, plaintif mengalami kecederaan serius. Defendan telah membuat laporan polis dan menyatakan bahawa plaintif telah datang dari arah bertentangan dan kemudian memasuki laluan beliau. Namun begitu, dalam keterangan beliau di mahkamah, beliau tiba-tiba timbul dengan versi kedua, di mana plaintif muncul dari sebelah kiri beliau dan masuk ke dalam laluan beliau. Hakim mahkamah sesyen yang bijaksana mempercayai versi defendan daripada versi plaintif tetapi mendapati defendan sama-sama cuai kerana kemalangan tersebut dan membahagikan liabiliti 50:50. Plaintif telah merayu ke Mahkamah Tinggi.

Diputuskan, membenarkan rayuan plaintif dan mendapati defendan bertanggungjawab keseluruhannya:

(1) Defendant tidak memberikan penjelasan tentang perbezaan antara apa yang dinyatakan dalam laporan polis beliau dan apa yangdinyatakan dalam keterangan beliau di mahkamah. Sekiranya itu yang sebenarnya berlaku, beliau tidak sepatutnya tertinggal untuk menyebutkan versi ini dalam laporan polis beliau yang telah dibuat sejurus kemalangan tersebut. Kegagalan nyata beliau untuk menjelaskan apa yang telah dinyatakan oleh beliau dalam laporan polis hendaklah diberi pertimbangan semasa meneliti keterangannya (lihat ms 548I, 549A–B).

(2) Hakim mahkamah sesyen yang bijaksana telah gagal untuk menimbangkan kerosakan terhadap kedua-dua kenderaan. Kerosakan ke atas kereta defendan kebanyakannya di sebelah kanan. Paling ketara adalah bahawa tayar depan sebelah kanan bengkok dan bahagian hadapan badan dan pintu kereta di sebelah kanan, remuk. Kerosakan-kerosakan tersebut, bersama dengan bahagian depan motorsikal jelas menunjukkan satu kesan yang konsisten dengan versi plaintif yang mana defendan telah muncul dari arah kiri plaintif dan membelok ke kanan masuk ke arah laluan plaintif apabila perlanggaran tersebut berlaku (lihat ms 549C–D).

(3) Setelah menimbangkan semua aspek berikut, adalah jelas bahawa penemuan liabiliti sama rata kedua-dua pihak oleh hakim mahkamah sesyen yang bijaksana tidak boleh disokong dengan keterangan yang ada. Keteranagn pegawai penyiasat yang membuat keterangan bahawa daripada siasatan beliau telah dapat memastikan bahawa setiap pihak telah datang dari arah yang bertentangan antara satu sama lain juga harus ditolak. Tiada asas untuk kesimpulan tersebut. Beliau tidak membuktikan apa-apa keterangan berhubung cara siasatan yang beliau telah lakukan untuk membolehkan beliau tiba kepada kesimpulan sedemikian (lihat ms 549F–G).]

A **Notes**

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1056–1288.

Baldev Singh Bhar (*Syarikat Baldev Bhar*) for the appellant/plaintiff.
B *P Ramanathan (VP Nathan & Partners)* for the respondent/defendant.

Kamalanathan Ratnam J:

The pleadings

C In his statement of claim, the plaintiff averred that as he was proceeding along Jalan Hashim towards the northerly direction a motorcar driven by the defendant suddenly emerged from a side road on his left and into the main road resulting in an accident between the two vehicles. In his particulars of negligence he averred that the defendant had failed to stop at
D the junction before emerging into the main road. As a result of the said accident, the plaintiff sustained quite serious injuries. His police report made about two months later, contained similar facts as pleaded.

Whilst admitting the collision in his defence, the defendant alleged in his particulars of negligence against the plaintiff, inter alia, that the plaintiff suddenly entered into the defendant's lawful path. In his police report made
E on the day of the accident, the defendant stated that as he was driving his motorcar along the said main road from the northerly to the southerly direction, the plaintiff riding his motorcycle from the opposite direction collided with his motorcar from the front.

F *The evidence led*

In his evidence, the plaintiff stated that he was about 20ft from the car when it emerged from the side road on his left and across his path causing the collision. He tried to brake but it was too late. He was then returning home from work. He denied the suggestion that the defendant did not emerge
G from the left but was in fact proceeding from the opposite direction. Under cross-examination, he admitted that as it was very early in the morning, the defendant had his lights on as he emerged from the junction but did not put out any signal of his intention to enter the main road.

Suddenly out of the blue, counsel for the defendant put to the plaintiff that the plaintiff had in fact emerged from a junction on the plaintiff's right
H and into the defendant's path.

At this stage, realizing that he had not pleaded this new found allegation that the plaintiff had emerged from the defendant's left and into his path, counsel indicated to the court that he would apply to amend his defence accordingly .

I The investigating officer testified that the front rim of the plaintiff's motorcycle was broken with the tyre having been pushed out from the rim. The handle of the motorcycle and the front head lamp were also broken. As

for the defendant's motorcar, he testified that the front windscreen was broken. The front right wheel was bent. The right front body and door of the car were dented. From his investigations, he was able to testify that each vehicle was proceeding from the opposite direction on the main road. I will come to this finding later.

After the close of the plaintiff's case, counsel for the defendant then applied for an oral amendment to include a new para (m) as another of the particulars of negligence of the plaintiff. It read as follows:

> Plaintif yang datang dari persimpangan atau di kawasan sebelah kiri defendan, telah menceroboh masuk ke jalan defendan yang datang dari arah Padang Serai ke Tasik Gelugor dan mengakibatkan kemalangan.

Counsel for the plaintiff objected to this and the court ruled that the defendant ought to apply formally with a supporting affidavit. At that stage, counsel for the plaintiff rightly applied for an adjournment to put in his amendment. However, the court directed that the defence could proceed with its case in the meantime, obviously to save time.

The defendant then testified that he was in fact proceeding from the northerly direction towards the south that is towards Butterworth. Visibility was clear. He then noticed the plaintiff riding his motorcycle and proceeding out of a junction on his left and ahead of him. The plaintiff turned to his right towards the direction the defendant was coming from. He could not do anything as he was too stunned and the collision occurred. He denied that he had emerged from the plaintiff's left as alleged by the plaintiff.

Under cross-examination, he admitted that when the plaintiff first emerged from the junction, he was about 200ft away from the plaintiff. The plaintiff then crossed his path and entered into his own half of the road to head towards the northerly direction. To a question from plaintiff's counsel how the accident could have happened if each party was on its own proper half of the road, the defendant then said that the motorcycle had then moved towards the centre of the road and was swerving from side to side. Before the case was adjourned for submission, counsel for the plaintiff withdrew his objection to the proposed oral amendment which was then allowed.

Findings of the court

The four-page judgment of the sessions court is so blurred that this court is unable to comprehend it fully. Counsel must realize that it is their duty to include in the appeal record documents that are decipherable. The learned sessions court judge believed the defendant's version rather than the plaintiff's version. I gather this after reading the legible parts of his judgment. However, he still found the defendant contributory, to the extent of 50% for being careless. Having heard arguments, I allowed the plaintiff's appeal and found the defendant totally liable.

I find that the defendant had not explained the difference between what was stated in his police report and what was stated in his evidence in court. In his report made on the same day as the accident, he had said that the plaintiff was proceeding from his opposite direction and then entered into

his path. However in his evidence in court, suddenly he comes out with a second version, that is that the plaintiff emerged from his left and across his path. Surely if this was what happened, he would not have omitted to mention this version in his police report which was made shortly after the accident. When the second version clearly is an exculpation of his culpability, I cannot understand why he did not state the second version in his report. His significant failure to explain why he said what he said in his police report must weigh heavily when analyzing his evidence. Besides why spring a surprise at the trial when he could have told this version much earlier to his counsel who could have amended the defence accordingly.

I also find that the learned sessions court judge had failed to consider the damages to the two vehicles. The damages to the defendant's motorcar are mostly on the right hand side. Of significance is the fact that the front right wheel was bent and the front right body and door, dented. These damages, together with the front rim of the motorcycle being broken clearly show an impact consistent with the plaintiff's version of the defendant emerging from the plaintiff's left and turning right across the plaintiff's path when the collision occurred. If the defendant's version is to be believed, then there ought to have been no accident at all since each party had gone on to his correct side of the road. Besides, the defendant's version of the accident subsequent to the plaintiff moving onto his correct side, is hard to swallow. The defendant gave no reason or possible reason why the plaintiff, having successfully crossed the defendant's path and having gone onto his correct path should then move back to the centre of the road, swinging from side to side. In any case, the defendant would have well gone past the plaintiff by then, and the collision could not have occurred. The defendant testified that when the plaintiff swung to the centre of the road and then encroached into his path, he was about 50ft away from the plaintiff. When asked why he could not have avoided the accident, he said he was too stunned to do anything. Having considered all these aspects, it is clear to me that the learned sessions court judge's finding of equal liability of both parties cannot be supported by the available evidence.

Coming to the evidence of the investigating officer who testified that from his investigations he had ascertained that each party was proceeding from the opposite direction to one another, this evidence must be rejected. There was no basis for such a conclusion. He led no evidence as to the type of investigations he had done to enable him to arrive at such a conclusion.

I therefore set aside the finding of 50-50 liability by the learned sessions court judge. On the evidence, I found the defendant totally liable and awarded costs to the plaintiff here and below.

Plaintiff's appeal allowed. Defendant totally liable.

Reported by Ezatul Zuria Azhari